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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BERNADINE GRIFFITH, et al.,  
Individually and on behalf of all  
others similarly situated,

*Plaintiffs,*

v.

TIKTOK INC., a corporation;  
BYTEDANCE, INC. a corporation,

*Defendants.*

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Case No. 5:23-cv-0964-SB-E

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION**

**REDACTED VERSION OF  
DOCUMENT PROPOSED TO BE  
FILED UNDER SEAL**

Judge: Hon. Stanley Blumenfeld, Jr.  
Date: August 16, 2024  
Time: 8:30 a.m.  
Place: Courtroom 6C

Action Filed: May 26, 2023  
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¶ or SAC	Second Amended Class Action Complaint, Dkt. 137
Defendants	TikTok Inc. and ByteDance Inc.
EAPI	Events Application Programming Interface (“API”)
Ex. ____	Exhibit(s) attached to the Declaration of Sheryl Shapiro Bassin in Support of Defendants’ Opposition to Plaintiffs’ Motion for Class Certification or the Declaration of Sheryl Shapiro Bassin in Support of Defendants’ Application For Leave to File Under Seal, both filed contemporaneously herewith
Kindler ¶ ____	Expert Report of Lauren Kindler, filed contemporaneously herewith
Li Decl. ¶ ____	Declaration of Lizzie Li in Support of Defendants’ Opposition to Plaintiffs’ Motion for Class Certification, filed contemporaneously herewith
Mangum ¶ ____	Declaration of Russell W. Mangum III in Support of Plaintiffs’ Motion for Class Certification, Dkt. 179-3
Mot.	Plaintiffs’ Memorandum of Points and Authorities in Support of Their Motion for Class Certification, Dkt. 179-1
Named Plaintiffs	Bernadine Griffith, Jacob Leady (Watters), and Patricia Shih
Pl. Ex. ____	Exhibit(s) attached to the Declaration of Y. Gloria Park in Support of Plaintiffs’ Motion for Class Certification, Dkt. 177-8, or the Sealed Declaration of Gregory Linkh in Support of Plaintiffs’ Application Under Local Rule 79-5 for Leave to File Under Seal, Dkt. 179
Schnell ¶ ____	Expert Report of Ron Schnell, filed contemporaneously herewith
Shafiq ¶ ____	Declaration of Zubair Shafiq in Support of Plaintiffs’ Motion for Class Certification, Dkt. 179-2
Stivers ¶ ____	Expert Report of Dr. Andrew Stivers, filed contemporaneously herewith
TikTok	The TikTok platform
TTI	TikTok Inc.

## I. INTRODUCTION

This case concerns the TikTok Pixel and EAPI, two industry-standard tools TikTok, Inc. (“TTI”) provides advertisers to measure and focus their advertising campaigns and promotions on TikTok. Advertisers can configure these tools to help gauge their users’ interactions, and TTI tries to match those interactions to TikTok users and the advertisements they have seen on TikTok. Because TTI seeks to help advertisers optimize their advertising to TikTok users on its platform, information received about non-TikTok users is essentially useless. Once TTI determines there is no match, it deletes that information.

Plaintiffs call this “[REDACTED]” (Mot. at 2) and propose a sprawling class of upwards of 100 million non-TikTok users who have visited one of the hundreds of thousands of websites that use the tools. The operative complaint promises evidence of TTI creating “detailed profiles” (§54) and “digital dossiers” (§§101, 184) of non-TikTok users. Yet all Plaintiffs can muster to support their current motion [REDACTED]

[REDACTED]. This lack of evidence highlights the reasons the Court should refuse to certify any class. Some of the most obvious include:

***Class Definitions.*** The classes are fatally overbroad, sweeping in anyone who ever visited a website using these tools who is not a TikTok user. But the mere collection of browsing data is not enough to state a privacy claim, an interception claim, or a property claim. And Plaintiffs identify [REDACTED]

***Commonality.*** Plaintiffs’ claims require a disclosure of identifying and sensitive information. This cannot be determined with common proof, but requires consideration of a particular website, its use of the tools, and a user’s interactions.

1 Plaintiffs' review of [REDACTED]

2 [REDACTED],  
3 showing the individual nature of this inquiry.

4 ***Predominance.*** The Court will become mired in individualized issues as it  
5 sorts out who is a member of the class, the reasonableness and offensiveness of any  
6 alleged privacy violation, the specific timing mechanisms that are claimed to give  
7 rise to an interception, the economic bases for any property claims, and consent.

8 Simply using a standard tool to collect online user activity is not *per se*  
9 unlawful. Like any tool, the Pixel and EAPI can be used in appropriate and  
10 inappropriate ways by advertisers. Stitching together a class that covers every way  
11 an advertiser may have used the Pixel and EAPI, all of their websites with their  
12 different practices, policies, and disclosures, and every non-TikTok user to visit  
13 those websites—without any reason to believe that they were harmed—cannot  
14 meet the strict requirements of Rule 23. Plaintiffs' motion should be denied.

## 15 **II. FACTUAL AND PROCEDURAL BACKGROUND**

16 TTI offers the video-based TikTok platform in the United States.<sup>1</sup> The  
17 platform has over one billion monthly active users globally, with about 170 million  
18 in the United States. Li Decl. ¶3. Like other similar companies, TTI sells  
19 advertising on its platform. Because information about its users helps make that  
20 advertising more effective, TTI offers industry-standard tools to advertisers to  
21 collect information about their customers and share that information with TTI.

### 22 **A. TTI's Advertising Tools**

23 TTI provides advertisers with two tools: the TikTok Pixel and EAPI. Ex. 1 at  
24 8. The data collected by these tools is displayed in dashboards that offer

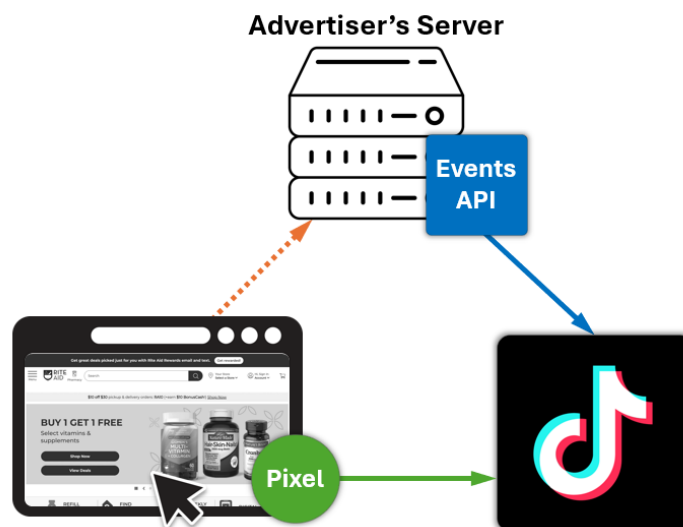
---

26 <sup>1</sup> ByteDance Inc. is a separate U.S. entity. Plaintiffs improperly collapse  
27 allegations and arguments against these distinct entities into generic allegations  
28 and arguments against "Defendants." Because Plaintiffs' Motion conflates TTI and  
ByteDance, the same problems for class certification exist for both.

information about advertisers' campaigns and promotions. *Id.* at 3-8. With this data, TTI helps advertisers tailor advertisements on TikTok. *Id.*

The TikTok Pixel is a piece of JavaScript code that advertisers can place on their websites. *Id.* at 9; Schnell ¶¶39. The Pixel allows advertisers to share website events—actions like adding an item to a shopping cart—with TTI. Ex. 1 at 9; Schnell ¶¶40. Advertisers can also share “PageView” information, including the URL, IP address, and cookies. Ex. 9 269:19-270:8; Schnell ¶¶41. A website owner decides what pages on which to install the Pixel, what events will trigger the Pixel, and what information to share with TTI. Schnell ¶¶41-42. This type of tool is not unique to TTI and has been offered for years. *Id.* ¶¶28-33.

EAPI is a server-to-server connection that allows an advertiser to share marketing data with TTI from across the advertiser's website, application (app), and brick-and-mortar stores. Ex. 1 at 10; Ex. 2 at 2. EAPI does not rely on the user's browser to send information to TTI—instead, the advertiser sends its own event information. Ex. 2 at 2; Schnell ¶¶57-60. This tool thus gives the advertiser greater control over when and what data it shares. Ex. 2 at 3.



**B. TTI Attempts to Match Data to TikTok Users and Deletes Unmatched Data**

Because TTI offers advertising only on its platform, it is interested only in data from TikTok users; however, because TTI cannot determine who is a TikTok user before collection, all data must be sent to TTI. *See* Ex. 10 85:5-16. TTI then tries to [REDACTED]. Ex. 11 57:10-21.

[REDACTED]. *Id.* 56:7-20. [REDACTED]

[REDACTED]. *Id.* 180:7-11; Ex. 10 39:14-16.

[REDACTED]. Pl. Ex. 25 at 59.

[REDACTED]. *See* Ex. 10 179:15-18.

**C. Advertisers Control What Data They Share**

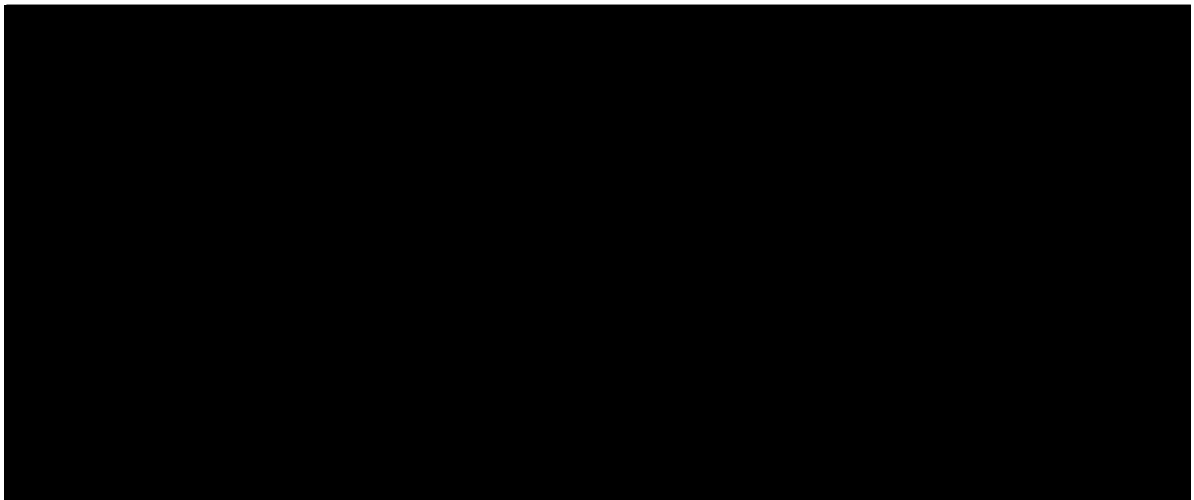
Use of the Pixel is optional. Depending on their goals, advertisers can choose to install the Pixel on a single webpage (e.g., the home page), multiple pages (e.g., particular product or article pages), or on every page. Ex. 3 at 2-3. They also control when and what information they share. *See id.* at 3; Ex. 1 at 11; Ex. 4 at 14. RiteAid.com, for example, installed the Pixel on most of the pages of its website, but the pages in the Pharmacy section have no Pixel. Schnell ¶43.

Using EAPI is also optional. *See* Ex. 1 at 11; Ex. 3 at 3. And unlike the Pixel, EAPI has no default settings—thus, if not properly configured to enable data sharing, EAPI will not share any data. Ex. 10 139:4-6.

Advertisers can (and do) alter the settings for these tools. As TTI tells advertisers: “[REDACTED]  
[REDACTED].” Ex. 1 at 12. Advertisers may change the

1 data they share depending on their campaigns. Ex. 3 at 4-7. They may even use  
2 different settings on multiple Pixels that are deployed simultaneously. Ex. 5.

3 The Vitamin Shoppe’s Pixel, for example, does not share email or phone  
4 information. Ex. 6 at 1. As mentioned, RiteAid chooses to use the Pixel only on  
5 certain pages of its website. *Supra*, p. 4. Some websites utilize additional Pixel  
6 features like “advanced matching” to collect emails and phone numbers. Ex. 10  
7 38:17-22; Ex. 11 105:20-106:4. Identifying information collected in these  
8 categories is protected by one-way SHA-256 hashing. Ex. 11 106:11-107:1; Ex. 12  
9 45:1-8; Li Decl. ¶5. Hashing means converting information into code that humans  
10 cannot decipher but computers can analyze. Ex. 11 106:11-107:1; Li Decl. ¶6.



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20 **D. Advertisers Are Responsible for Making the Necessary**  
21 **Disclosures, Securing Consent, and Using the Tools Appropriately**

22 Advertisers that use TTI’s tools must agree to TTI’s Business Products  
23 (Data) Terms. Ex. 7. The terms require advertisers using the Pixel or EAPI to  
24 provide “clear and comprehensive information to users in a sufficiently prominent  
25 notice regarding the access to, and collection, sharing, and usage of Business  
26 Products Data,” and to comply with all applicable laws. *Id.* at 8.

27 Advertisers make different disclosures. Stivers ¶¶36-39. Hulu’s parent  
28

1 company states that it shares “limited personal information . . . with third parties”  
 2 (Pl. Ex. 12 at 7) using different “beacons and marketing pixels” (Pl. Ex. 13 at 3).  
 3 Others specifically disclose TTI. Every Man Jack, which sells grooming products  
 4 for men, states: “we use the TikTok Pixel,” and explains how it works.<sup>2</sup> Bump  
 5 Box, which sells pregnancy products, names the specific TTI cookies it uses.<sup>3</sup>

6 Advertisers must also use the tools lawfully, consistent with their  
 7 disclosures, and in a manner that does not disclose their users’ sensitive  
 8 information. Advertisers are instructed to avoid the disclosure of “health or  
 9 financial information, or other categories of sensitive information.” Ex. 7 at 4. [REDACTED]

10 [REDACTED]  
 11 [REDACTED]. Li Decl. ¶11.

#### 12 **E. Consumers Can Control What Information Websites Share**

13 Consumers can manage what information is disclosed online. Consumers  
 14 can use browser tools, privacy settings, or software to control what is shared  
 15 online. Stivers ¶¶40-44; Schnell ¶80(d). TTI also offers TikTok Pixel Helper, a  
 16 Chrome extension that shows what information (if any) is being shared on a page.<sup>4</sup>

17 Consumers ultimately choose which websites to frequent and which pages to  
 18 visit. Stivers ¶¶12-21. These websites may have different privacy practices and  
 19 make different disclosures. *Id.* ¶¶36-39. Some consumers do not read any  
 20 disclosures; others may independently research. *Id.* Depending on the website,  
 21 consumers may be comfortable sharing information, may browse without  
 22 registering, may or even provide fake information. Stivers ¶¶22-35; Schnell ¶¶79,

24  
 25 <sup>2</sup> Every Man Jack, “Privacy Policy,”  
<https://www.everymanjack.com/pages/privacy-policy>.

26 <sup>3</sup> Bump Box, “Privacy Policy,” <https://bumpboxes.com/privacy-policy>.

27 <sup>4</sup> “Troubleshoot with Pixel Helper,” [https://ads.tiktok.com/help/article/tiktok-](https://ads.tiktok.com/help/article/tiktok-pixel-helper-2.0?lang=en)  
 28 [pixel-helper-2.0?lang=en](https://ads.tiktok.com/help/article/tiktok-pixel-helper-2.0?lang=en).

1 107-110; Ex. 13 219:6-22 ([REDACTED]); Ex. 14 141:25-142:5 ([REDACTED])  
2 [REDACTED]; Ex. 15 183:13-191:13 ([REDACTED]).

### 3 **F. This Litigation**

4 Bernadine Griffith commenced this action on May 26, 2023. Plaintiffs allege  
5 six causes of action: (1) intrusion; (2) invasion of privacy; (3) conversion; (4)  
6 larceny; and violations of (5) the California Invasion of Privacy Act (“CIPA”) and  
7 (6) the Electronic Communications Privacy Act (“ECPA”). Dkt. 137 (“SAC”).

8 Plaintiffs seek to represent various classes of non-TikTok users who have  
9 visited any website where the Pixel was installed or any website that was used with  
10 EAPI. Dkt. 177.

### 11 **III. LEGAL STANDARD**

12 A plaintiff seeking to certify a class has the burden of showing the Rule 23(a)  
13 requirements of numerosity, commonality, typicality, and adequacy, as well as the  
14 requirements for one kind of class under Rule 23(b). Fed. R. Civ. P. 23. These are  
15 “stringent requirements” that “in practice exclude most claims.” *Am. Express Co. v.*  
16 *Italian Colors Rest.*, 570 U.S. 228, 234 (2013); *see also Comcast Corp. v. Behrend*,  
17 569 U.S. 27, 33 (2013). There are no presumptions in favor of certification: “actual,  
18 not presumed, conformance” with Rule 23 is “indispensable.” *Gen. Tel. Co. of SW*  
19 *v. Falcon*, 457 U.S. 147, 160 (1982).

### 20 **IV. ARGUMENT**

#### 21 **A. Plaintiffs’ Proposed Classes Are Fatally Overbroad**

22 The proposed classes are wildly and unworkably broad. Plaintiffs seek to  
23 certify various classes of non-TikTok users who visited any (or a particular)  
24 website with the Pixel installed or with EAPI. Dkt 177. At their largest, Plaintiffs  
25 purport to include up to 50-100 million people who may have visited any one of  
26 hundreds of thousands of websites. To achieve this scope, Plaintiffs define their  
27  
28



1 classes in a way that is “arbitrary and untethered to” any harm. *Gbarabe v.*  
 2 *Chevron Corp.*, 2017 WL 956628, at \*30 (N.D. Cal. Mar. 13, 2017).

3 Plaintiffs’ proposed classes center around the data they allege is always  
 4 disclosed: timestamp, IP address, user agent, cookies, URL, event information, and  
 5 content information. Shafiq ¶¶59-66; *but see* Schnell ¶¶85-89 (explaining that [REDACTED]  
 6 [REDACTED]). Plaintiffs focus on the fact of this collection and these common types  
 7 of data, as opposed to the specific content of any data collected.

8  
 9 There is a problem with Plaintiffs’ certification strategy—the mere  
 10 collection of browsing data is both commonplace and perfectly legal. As the Ninth  
 11 Circuit has held, one’s IP address or the URL of the pages one visits are not  
 12 private. *See United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) (IP  
 13 address); *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1108-09 (9th Cir. 2014)  
 14 (URL). This information is also not the “content” of any communication. *In re*  
 15 *Meta Pixel Healthcare Litig.*, 647 F. Supp. 3d 778, 795 (N.D. Cal. 2022). Nor can  
 16 Plaintiffs claim a property interest because this data no more belongs to them than  
 17 it does to the websites they visit. *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010,  
 18 1030 (N.D. Cal. 2012). As one court put it, the “disclosure of common, basic  
 19 digital information to third parties” is not actionable. *In re Google, Inc. Privacy*  
 20 *Policy Litig.*, 58 F. Supp. 3d 968, 985 (N.D. Cal. 2014).

21 To be actionable, Plaintiffs must establish facts beyond mere browsing data  
 22 collection. The data must be identifying and sensitive. *See In re Facebook, Inc.*  
 23 *Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020). To be a “content,” a  
 24 full string URL must contain particular information like search terms. *Hammerling*  
 25 *v. Google LLC*, 615 F. Supp. 3d 1069, 1092-93 (N.D. Cal. 2022). Plaintiffs must  
 26 have some recognized basis to exclude others from that information. *See, e.g.,*  
 27 *Calhoun v. Google Inc.*, 526 F. Supp. 3d 605, 635 (N.D. Cal. 2021) (relying on  
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Google’s Do-Not-Sync representations); *CTC Real Estate Servs. v. Lepe*, 140 Cal. App. 4th 856, 860 (2006) (statutory identity theft protections); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 798-99 (N.D. Cal. 2011) (rights of publicity). These factual issues are individualized—which is why Plaintiffs ignore them.

Because Plaintiffs ignore these factual issues, the proposed classes sweep in many people with no claim or injury. A court “must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022). When “a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant’s allegedly unlawful conduct, the class is defined too broadly to permit certification.” *Id.*

Shafiq ¶¶63(v), 63(vi).

. Ex. 16 253:18-256:22, 265:7-25.

The struggle to find one potentially actionable example [REDACTED] is exactly what the Ninth Circuit warns against. *Olean*, 31 F.4th at 664; *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (class overbroad when not limited to those misled by ads, instead including everyone who purchased a certain car); *Diacakis v. Comcast Corp.*, 2013 WL 1878921, at \*4 (N.D. Cal. May 3, 2013) (class overbroad when not limited to customers deceived by Comcast, instead including everyone who purchased certain products). Dr. Shafiq’s difficulties would grow exponentially with more data. Notably, [REDACTED]

[REDACTED].

## **B. Plaintiffs Have Not Satisfied the Requirements of Rule 23(a)**

### **1. Plaintiffs Fail to Establish Commonality**

To be common, a question must be susceptible to classwide proof. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). It is true a single common question can satisfy Rule 23(a). It is equally true, though, that raising “common ‘questions’—even in droves” is not enough; Plaintiffs must show that the questions have “the capacity of a classwide proceeding to generate common answers apt to drive resolution of the litigation.” *Id.* The common question(s) must be “central to the validity of each one of the claims.” *Id.*

To establish commonality, Plaintiffs refer the Court to their predominance arguments. Mot. at 5. Plaintiffs believe the following are common:

- Whether the collection of sensitive data from class members violated a reasonable expectation of privacy;
- Whether the collection of sensitive data was highly offensive;
- Whether the collection of data was an intentional interception of the contents of Plaintiffs’ communications;
- Whether class members’ data constitutes property;
- Whether the defendants’ collection of data was a trespass;

1           • Whether defendants’ collection of data was explicitly disclosed.  
 2 *Id.* This list is revealing. There are two issues embedded in each of Plaintiffs’  
 3 “common” questions: (1) whether information was disclosed to TTI and (2) the  
 4 nature of the information. Those are the truly central questions.

5           These embedded questions cannot be answered on a classwide basis. Their  
 6 answers turn on the circumstances each time these tools are used. As Dr. Shafiq  
 7 observed, [REDACTED]  
 8 [REDACTED]. Ex. 16 136:15-20, 145:2-12. Whether information  
 9 is disclosed to TTI, let alone whether it is private or protectible, depends on the  
 10 website and its design, the installation and configuration of the tools, and users’  
 11 settings and interactions with websites. Schnell ¶¶68-110.

12           Website Details. Different websites raise different privacy considerations.

13 [REDACTED]. Ex. 16 268:22-269:1. [REDACTED]  
 14 [REDACTED]. *Id.*  
 15 85:20-24. [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]. *Id.* 91:4-20, 136:15-20; Schnell ¶¶83-93.

18           Advertiser Use and Configuration of the Pixel and EAPI. Because EAPI is a  
 19 direct connection, advertisers have complete control over the information shared.  
 20 *Supra*, p. 3. For the Pixel, advertisers decide whether to install it on every page of  
 21 its website or on certain pages. Schnell ¶42. Advertisers also control the events that  
 22 trigger the Pixel and the information that it shares. *Id.* ¶¶40-41. Like any tool, these  
 23 tools must be properly installed and configured. Ex. 10 39:14-16, 139:4-6.

24           Class Member Interactions. Users choose which websites to visit, how much  
 25 to engage, and the information they provide. Stivers ¶¶22-35, 45-61. Users also  
 26 have many privacy protection options, such as cookie blockers or other privacy  
 27 controls, that can prevent the disclosure of identifying or sensitive information. *Id.*  
 28

¶¶40-44; Schnell ¶80(d). Users can even provide false or fake information. As Mr. Schnell found, [REDACTED] [REDACTED].” Schnell ¶79.

None of these individual factors can be ignored. The specific circumstances matter because they represent the difference between a claim or no claim. As Judge Orrick noted in *Meta Pixel Healthcare*, even information that a person visited www.cancer.net “pages containing information about treatment options for melanoma, information about a specific doctor, search results related to the phrase ‘intestine transplant,’ [and] a wife’s blog post about her husband’s cancer diagnosis” is not actionable because it is “general health information” that is “available to every computer . . . or automated crawler that sends GET requests.” *Meta Pixel Healthcare*, 647 F. Supp. 3d at 792-93. But information “that a user is about to log in to a healthcare provider’s website,” however, could be actionable because that reveals patient status. *Id.* at 793.

These individualized inquiries make class treatment untenable. It may be possible to certify a class when there is a single practice by a single actor uniformly applied to every class member. *See In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091 at \*1-3 (N.D. Cal. Mar. 26, 2014). But here, [REDACTED] [REDACTED]. It too may be possible to certify a class when there is a common theory of disclosure. *See In re Hulu Privacy Litig.*, 2014 WL 2758598, at \*17 (N.D. Cal. June 17, 2014). But here there is no common practice. Plaintiffs focus on the fact that Pixel and EAPI can transmit information, but ignore that what is transmitted and the mechanism of transmission differ.

Dr. Shafiq’s [REDACTED]

[REDACTED], exacerbates the lack of commonality. [REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED]. At bottom, Plaintiffs’ theory depends [REDACTED]  
[REDACTED]  
[REDACTED].

Plaintiffs cannot sidestep these individual inquiries by framing the issues in a way that starts from the assumption of a disclosure. If the case proceeds, Plaintiffs must prove—not presume—these disclosures. Because Plaintiffs’ proposed “common” questions incorporate these issues, they prove not to be common at all, and resolving them will require individualized analysis.

## 2. The Named Plaintiffs Are Not Typical or Adequate

There are two problems with Plaintiffs’ ability to represent class members. *First*, Plaintiffs cannot represent visitors to websites they themselves never visited. *Falcon*, 457 U.S. at 156 (“a class representative must be part of the class”). Here, the nationwide classes extend to all non-TikTok users who “visited a website using the TikTok Pixel.” Dkt. 177 at 1. Hundreds of thousands of websites use the Pixel. Of those, Mr. Watters has visited one, Ms. Shih three, and Ms. Griffith five. *See* Dkt. 177 at 4-5.

Different websites with different content, practices, and user interactions raise different privacy concerns. Stivers ¶¶36-61. A person ordering McDonalds from Doordash is not the same as a patient making a medical appointment. A consumer purchasing tanning oil is not the same as a patient refilling diabetes medication, even if they visited the same website, which may be why RiteAid does not use the Pixel on its Pharmacy pages. Schnell ¶43. Nor do Plaintiffs offer evidence that their idiosyncratic and subjective views of privacy reflect those of the typical non-TikTok user. Stivers ¶¶12-35. Where differently situated Plaintiffs and class members have divergent interests, typicality is not satisfied. *See Wiley v.*

1 *Am. Fin. Network, Inc.*, 2023 WL 4681538, at \*2-3 (C.D. Cal. July 3, 2023).

2 Moreover, different websites have different policies. There is no typicality  
3 when Plaintiffs and class members viewed different disclosures based on the  
4 websites, their jurisdiction, the time they viewed them, and other factors. Courts  
5 routinely deny certification when members receive different disclosures or privacy  
6 policies. *E.g.*, *Withers v. eHarmony, Inc.*, 2010 WL 11520198, at \*3 (C.D. Cal.  
7 June 2, 2010) (terms of service); *see also Guzman-Lopez v. Am. Bottling Co.*, 2020  
8 WL 913088, at \*4 (C.D. Cal. Jan. 6, 2020) (privacy policies).

9 **Second**, “there is a danger that absent class members will suffer if their  
10 representative is preoccupied with defenses unique to it.” *Hanon v. Dataproducts*  
11 *Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Plaintiffs have not shown a disclosure.  
12 [REDACTED]. Shafiq ¶63(v). Thus,  
13 it is not even clear how the named Plaintiffs have standing.<sup>5</sup>

14 More significantly, [REDACTED]  
15 [REDACTED]  
16 [REDACTED]. Ex. 13 345:7-25 [REDACTED]  
17 [REDACTED]; Ex. 14 176:18-20 ([REDACTED]); Ex. 15  
18 293:10-13 ([REDACTED]).

19 These facts make Plaintiffs problematic class representatives. Their  
20 [REDACTED]  
21 undermine their claims of injury. These facts establish consent, or at least  
22 indifference, to the practices complained of. *See In re Google Inc. Gmail Litig.*,  
23 2014 WL 1102660, at \*17 (N.D. Cal. Mar. 18, 2014) (implied consent); *Sherman*  
24 *v. Yahoo! Inc.*, 2015 WL 5604400, at \*8-9 (S.D. Cal. Sept. 23, 2015) (differences  
25 in consent defeated typicality and adequacy); *Bustillos v. W. Covina Corp. Fitness*,  
26 2022 WL 423396, at \*3-4 (C.D. Cal. Jan. 3, 2022) (Blumenfeld, J.) (no typicality  
27

28 <sup>5</sup> Ms. Shih cannot represent the cookie-blocker classes. Schnell ¶¶81-82.



when named plaintiff atypical on consent); *McHugh v. Metro. Life Ins. Co.*, 2023 WL 3318691, at \*3-4 (C.D. Cal. Mar. 31, 2023) (Blumenfeld, J.) (no typicality when named plaintiffs received different disclosures). It also prohibits Plaintiffs' ability to seek injunctive relief. *See In re Coca-Cola Prods. Mktg. & Sales Practices Litig.*, 2021 WL 3878654, at \*2-3 (9th Cir. Aug. 31, 2021).

**C. Plaintiffs Have Not Satisfied the Requirements for Certifying a Class Under Rule 23(b)(3)**

**1. Individual Issues Predominate**

Predominance is "more demanding" than commonality. *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1233 (9th Cir. 2024). It "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

**a) Class Membership Is Individualized**

As a threshold matter, the Court must determine who is in the class. While the Ninth Circuit has not adopted an ascertainability test, it has recognized a court may consider membership issues as part of predominance. *See Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 632 (9th Cir. 2020).

Plaintiffs' classes follow the same equation of non-TikTok user + visiting a website + which uses Pixel or EAPI (+ for some, cookie blockers). These determinations cannot be made by reviewing Defendants' records, which are hashed. *Supra*, p. 5. Dr. Shafiq [REDACTED] [REDACTED]. Shafiq ¶63(v).

Class membership would therefore be determined by class members self-reporting whether they visited certain websites, what they did on those websites, and whether they used cookie blockers or other privacy software. Self-reporting is unreliable and has doomed other classes. *See Hulu Privacy Litig.*, 2014 WL



2758598, at \*16 (self-reporting use of cookie blockers not reliable); *see also* *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (self-reporting smoking habits not reliable); *Brewer v. Gen. Nutrition Corp.*, 2014 WL 5877695, at \*14-15 (N.D. Cal. Nov. 12, 2014) (self-reporting individualized).

The task here is even more daunting because class membership requires the coincidence of multiple factors. A class member must establish that they visited a website, when it used the Pixel, and when they used cookie blockers. To complicate matters, members must not only know about the websites, they must know what pages they visited, when, and if that page was using the Pixel.

Dr. Shafiq offers two solutions. The first takes self-reported emails, compares them against TTI's records, excludes matches, and then everyone else is in the class. Shafiq ¶95. But this does not determine class membership; it assumes it. It also sweeps in those who register with a phone number or a different email.

His second suggestion is to use TTI's data to look for identifying information for non-TikTok users. *Id.* ¶96. This is a non-starter because TTI does not keep unmatched data; it is also not feasible when Dr. Shafiq could find such information only sporadically. Any proposal to force TTI to keep indefinitely massive amounts of unmatched data for Plaintiffs' litigation purposes is directly at odds with claims that such data should not be collected or used.<sup>6</sup>

**b) As Alleged, Plaintiffs' Privacy Torts Require Individual Adjudication**

The privacy claims require (1) a reasonable expectation of privacy and (2) a highly offensive intrusion. *See Hammerling*, 615 F. Supp. 3d at 1088.

Courts regularly deny certification when these issues are in dispute. One

<sup>6</sup>

[REDACTED]

1 court denied certification regarding location data collection because “factors  
2 personal to an individual” will affect both elements. *Hart v. TWC Prod. & Tech.*  
3 *LLC*, 2023 WL 3568078, at \*9 (N.D. Cal. Mar. 30, 2023). Another denied  
4 certification for information collection via toll roads because claims “would turn  
5 on a slew of potential factors” individual to each member. *In re Toll Rds. Litig.*,  
6 2018 WL 4945531, at \*7 (C.D. Cal. Oct. 3, 2018); *see also McDonald v. Aps*, 385  
7 F. Supp. 3d 1022, 1035 (N.D. Cal. 2019) (offensiveness is “context-specific”).

8 The same obstacles to commonality exist here. Plaintiffs try to force  
9 commonality by claiming non-TikTok users would not expect their data to be  
10 collected by TTI. Mot. at 7. This is not based on any representation by TTI—it is a  
11 belief Plaintiffs assume everyone holds. *Id.* There is no evidence of this shared  
12 understanding. Stivers ¶¶12-21. Even then, that understanding must be reasonable,  
13 which would depend on a person’s knowledge about data collection, experience  
14 with particular websites, disclosures, the information collected, and their online  
15 behavior. *See Gmail Litig.*, 2014 WL 1102660, at \*21 (privacy disclosures);  
16 *Deering v. CenturyTel, Inc.*, 2011 WL 1842859, at \*2 (D. Mont. May 16, 2011)  
17 (independent knowledge); *Hammerling*, 615 F. Supp. 3d at 1090 (quantity and  
18 nature of the information collected).

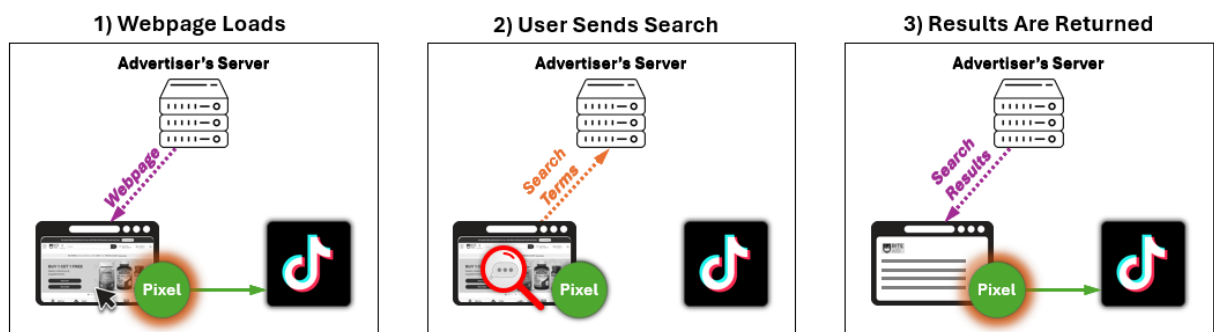
19 As to offensiveness, Plaintiffs try to turn TTI’s internal discussions about  
20 privacy against them. Mot. at 11-12. [REDACTED] does not  
21 establish that any receipt of information is unreasonable, upsets reasonable  
22 expectations, or violates social norms. No matter how Plaintiffs characterize those  
23 discussions, the law requires evaluation of the information collected, its sensitivity,  
24 the manner of collection and, perhaps most importantly, representations made to  
25 consumers. *Hammerling*, 615 F. Supp. 3d at 1088.

### c) Wiretapping Claims Require Individual Adjudication

To state a claim under ECPA or CIPA, Plaintiffs must show that Defendants intercept the “contents” of communications. *Hammerling*, 615 F. Supp. 3d at 1092-93. The interception must occur in transit and be “contemporaneous with transmission.” *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 876 (9th Cir. 2002). This requires individual adjudication for two reasons.

**First**, a “URL that includes ‘basic identification and address information’ is not ‘content.’” *Meta Pixel Healthcare*, 647 F. Supp. 3d at 795; *Hammerling*, 615 F. Supp. 3d at 1093. When a URL reveals actions, such as “search engine queries,” they can be “contents,” but not always. *Gershzon v. Meta Platforms, Inc.*, 2023 WL 5420234, at \*12 (N.D. Cal. Aug. 22, 2023). Each URL must be analyzed.

**Second**, interception depends on how the Pixel is implemented. Timing matters. There is no wiretapping unless contents are intercepted while “in transit” to the intended recipients. *Konop*, 302 F.3d at 876. Implementation affects timing. Plaintiffs argue for a common interception based on the default Pageview event. Mot. at 13-16. But a wiretapping claim based on Pageview makes no sense. As Plaintiffs’ expert admitted, [REDACTED]. Ex. 16 191:19-192:16. Thus, [REDACTED]. [REDACTED]. [REDACTED]. *Id.*; Schnell ¶¶111-23.



1 Dr. Shafiq admitted that [REDACTED]

2 [REDACTED]  
3 [REDACTED]. Ex. 16 192:18-193:21;

4 Schnell ¶¶111-23. Plaintiffs must therefore establish some other configuration to  
5 claim contemporaneous disclosure of a user's communication. Resolution will  
6 require a close look at each configuration.

7 **d) Property Torts Require an Individualized Showing of**  
8 **Property Rights**

9 For conversion or larceny, Plaintiffs must have a property right. *Calhoun*,  
10 526 F. Supp. 3d at 635. This requires a plaintiff to show that the data is "capable of  
11 exclusive possession or control" and "a legitimate claim to exclusivity." *In re*  
12 *iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1074-75 (N.D. Cal. 2012).

13 No court has found a property right to browsing information generally. *See*  
14 *Low*, 900 F. Supp. 2d at 1030. Property has been limited to specific types of data  
15 and situations where plaintiffs are entitled to control its dissemination. *Calhoun*  
16 recognized a potential property right in "*personal* information," not browsing  
17 information generally. 526 F. Supp. 3d at 635 (emphasis added). Conversion and  
18 larceny are also intentional torts. Specific intent will require more than [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 **e) Consent Is Individualized**

22 Someone "who consents to an act is not wronged by it." Cal. Civ. Code  
23 § 3515. Express consent will require evaluating each website's disclosures, which  
24 vary. *Supra*, pp. 5-6. It will also require litigating the enforceability of every  
25 website's terms and the efficacy of its use of clickwrap, browsewrap, cookie  
26 banners, or other methods. *See generally Colgate v. Juul Labs, Inc.*, 402 F. Supp.  
27 3d 728, 762-64 (N.D. Cal. 2019). Implied consent too is "intensely factual" and  
28 "requires consideration of the circumstances" regarding what consumers knew.

1 *Gmail Litig.*, 2014 WL 1102660, at \*14-16; *In re Google RTB Consumer Privacy*  
 2 *Litig.*, 2024 WL 2242690, at \*12 (N.D. Cal. Apr. 4, 2024).

3 Litigating consent will cause individual issues to predominate. *See True*  
 4 *Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931 (9th Cir. 2018).  
 5 In *Brown v. Google LLC*, the court denied certification on data collection from  
 6 Google Chrome’s Incognito Mode because consent required analysis of Google’s  
 7 disclosures and the information each class member reviewed. 2022 WL 17961497,  
 8 at \*17-19 (N.D. Cal. Dec. 12, 2022). The same occurred in *Google RTB*, where  
 9 consent depended on the disclosures and information class members had seen.  
 10 2024 WL 2242690, at \*12-14. This case is far more difficult because it concerns  
 11 the disclosures of hundreds of thousands of websites. The use of common tools  
 12 makes it worse because what one learns from one website carries over to another.

13 Plaintiffs illustrate how consent will vary. Mr. Watters [REDACTED]  
 14 [REDACTED] Ex. 13 91:13-20, 93:22-94:4. Ms. Griffith [REDACTED]  
 15 [REDACTED]. Ex. 14 132:8-11. Ms.  
 16 Shih [REDACTED]  
 17 [REDACTED]. Ex. 15 264:6-276:9. Indeed, Plaintiffs relied on public  
 18 information on the Pixel to draft their complaint. Ex. 8; *see also* Kindler ¶¶35-37.

#### 19 **f) Damages Determinations Are Individualized**

20 Plaintiffs must show that “damages are capable of measurement on a  
 21 classwide basis.” *Comcast Corp.*, 569 U.S. at 34; *see also Bowerman v. Field Asset*  
 22 *Servs., Inc.*, 60 F.4th 459, 469-70 (9th Cir. 2023); *Franklin v. Midwest Recovery*  
 23 *Sys., LLC*, 2021 WL 1035121 (C.D. Cal. Feb. 5, 2021) (Blumenfeld, J.).

24 Plaintiffs bank on disgorgement, but disgorgement requires the measurement  
 25 of “the net [profit] . . . attributable to the underlying wrong.” *Brooks v. Thomson*  
 26 *Reuters Corp.*, 2023 WL 5667884, at \*3 (N.D. Cal. Aug. 9, 2023). Thus,  
 27 disgorgement must distinguish between lawful and allegedly unlawful uses of the  
 28

Pixel and EAPI. Kindler ¶¶14, 40-46. The “Court would have [to] ascertain each consumer’s particular use and experience” with TTI’s data collection and the extent of alleged harm. *Torres v. Nissan N. Am. Inc.*, 2015 WL 5170539, at \*6 (C.D. Cal. Sept. 1, 2015). That precludes certification.

Restitutionary damages fare no better. Opining that browsing data has some economic value falls short of establishing a common way to measure it for the class. Any valuation requires comparing how much and what data was collected from each class member to market analogues. Kindler ¶¶25-38, 47-60.

Plaintiffs thus provide no “method[] common across the class” to determine actual damages. *In re Apple iPhone Antitrust Litig.*, 2022 WL 1284104, at \*16 (N.D. Cal. Mar. 29, 2022); *see, e.g., Moeller v. Taco Bell Corp.*, 2012 WL 3070863, at \*5 (N.D. Cal. July 26, 2012) (no certification when damages depended on the “stores visited, how many times he/she visited . . . , when the visits occurred, what [] he/she encountered, and what his/her disability was.”).

The availability of statutory damages under CIPA and ECPA does not obviate these problems. Statutory damages are discretionary—that discretion cannot be exercised collectively. *Campbell v. Facebook, Inc.*, 315 F.R.D. 250, 267-69 (N.D. Cal. 2016). Any suggestion to forgo actual for statutory damages creates a conflict between the named Plaintiffs and class members. *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013).

## 2. A Class Action Is Not a Superior Means of Adjudication

“If each class member has to litigate numerous and substantial separate issues . . . a class action is not ‘superior.’” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001). As Dr. Shafiq experienced, [REDACTED]

[REDACTED]. This would be a massive undertaking that needlessly multiplies litigation with little public benefit.

1 The subclasses are also unmanageable. “[E]ach subclass must independently  
 2 meet the requirements of Rule 23[.]” *Betts v. Reliable Collection Agency, Ltd.*, 659  
 3 F.2d 1000, 1005 (9th Cir. 1981). Even in a single-website world, the page-based  
 4 and campaign-based nature of the Pixel means a website may have multiple pixels  
 5 with changing settings running simultaneously. *Supra*, pp. 4-5. Any disclosure  
 6 requires understanding the specific pages with the Pixel, the period it was used,  
 7 and whether the data disclosure included personal, sensitive, or substantive  
 8 information. It also does not remove consent issues. The need for many subclasses  
 9 can defeat superiority. *See Sacred Heart Health Sys., Inc. v. Humana Military*  
 10 *Healthcare Servs., Inc.*, 601 F.3d 1159, 1184 (11th Cir. 2010); *Dzielak v.*  
 11 *Whirlpool Corp.*, 2017 WL 6513347, at \*20 (D.N.J. Dec. 20, 2017).

12 **D. Plaintiffs Cannot Certify an Injunctive Class Under Rule 23(b)(2)**

13 Certification under Rule 23(b)(2) is available only when the alleged conduct  
 14 can be “declared unlawful” in all circumstances for the “class as a whole.”  
 15 *Jennings v. Rodriguez*, 583 U.S. 281, 313 (2018); *Wal-Mart*, 564 U.S. at 360-61.  
 16 The key is “the indivisible nature of the injunctive or declaratory remedy”—the  
 17 fact that the conduct at issue is such “that it can be enjoined or declared unlawful  
 18 only as to all . . . or as to none of them.” *Wal-Mart*, 564 U.S. at 360. “Put another  
 19 way, a class may *not* be certified under Rule 23(b)(2) if *any* class member’s injury  
 20 is not remediable by the injunctive or declaratory relief sought.” *Berni v. Barilla*  
 21 *S.P.A.*, 964 F.3d 141, 146 (2d Cir. 2020) (emphasis in original).

22 Injunctive relief is divisible because it would affect the class differently.  
 23 Stopping the use of the tools to prohibit [REDACTED]  
 24 [REDACTED] is an improper use of injunctive relief. If some are benefited, and some are  
 25 not, by injunctive relief, the injunction is necessarily divisible. *See Berni*, 964 F.3d  
 26 at 148; *Anthony v. Pharmavite*, 2019 WL 109446, at \*6 (N.D. Cal. Jan. 4, 2019).



1 Plaintiffs also lack standing to seek prospective relief. *Davidson v.*  
 2 *Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (separate standing  
 3 required for injunction). The “threat of injury must be ‘actual and imminent, not  
 4 conjectural or hypothetical.’” *Id.* For a “threat of repeated injury, a plaintiff must  
 5 show ‘a sufficient likelihood that he will again be wronged in a similar way.’” *Id.*

6 Plaintiffs can no longer claim lack of knowledge of the Pixel or EAPI. Next  
 7 time they visit a website, “they will be doing so with exactly the level of  
 8 information that they claim they were owed.” *Berni*, 964 F.3d at 148. While the  
 9 Ninth Circuit has said that injunctive relief may be available to such plaintiffs,  
 10 *Davidson*, 889 F.3d at 967, those circumstances are narrowly construed, and there  
 11 must be a specific showing, which Plaintiffs cannot meet. *See Coca-Cola*, 2021  
 12 WL 3878654, at \*2-3.

13 **E. Plaintiffs Have Not Met the Requirements for Certifying an Issues**  
 14 **Class Under Rule 23(c)(4)**

15 Rule 23(c)(4) certification is possible when “adjudication of the certified  
 16 issues would significantly advance the resolution of the underlying case.”  
 17 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1229 (9th Cir. 1996). The three  
 18 issue classes cannot be certified because they still require individualized  
 19 determinations that a disclosure occurred and that the data was identifying,  
 20 sensitive, or protected. Nothing is gained with these issue classes.

21 **V. CONCLUSION**

22 TTI has simply provided two industry-standard advertising tools. As with  
 23 any tool, they can be used in lawful and unlawful ways. Claims about how these  
 24 tools are used cannot be adjudicated en masse. This is especially so when instances  
 25 of disclosure, let alone actionable ones, are few and far between.

26 Plaintiffs’ motion overreaches. They broadly define classes of everyone who  
 27 may have had browsing data collected, even though that alone is not unlawful.  
 28



1 They seek damages based on the possibility something private may have been  
2 disclosed, even though they cannot show anything of the sort actually happened to  
3 them. And they seek to shut down Pixel and EAPI even though they are standard  
4 tools that many platforms offer and most advertisers use without issue. Their  
5 motion should be denied.

6  
7  
8 Dated: July 12, 2024

WILSON SONSINI GOODRICH & ROSATI  
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9  
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13 TikTok Inc. and ByteDance Inc.  
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**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Defendants TikTok Inc. and ByteDance Inc., certifies that this brief contains 6,997 words, which complies with the word limit of L.R. 11-6.1.

Dated: July 12, 2024

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